



May 7, 2008

United States Department of Agriculture
Office of the Under Secretary
Attn: Under Secretary Mark Rey
1400 Independence Ave., S.W.
Washington, D.C. 20250

Via U.S. Mail, and facsimile to: (202) 720-7173

Re: Proposed Forest Service roads Easement Amendment

Dear Mr. Rey:

Thank you for meeting with us on April 28, 2008, regarding the proposed Easement Amendment arising out of your negotiations with Plum Creek Timber Company for amendment of easement rights. Unfortunately, it is clearly impossible to resolve, or even address, all issues arising out of the negotiations between your office and Plum Creek, in a single public meeting.

During our meeting you invited Missoula County to provide you with comments and suggestions on further public process and on substantive changes to the Easement Amendment document. We are writing to provide you with our comments to the best of our ability, although we note that these comments are limited due to your inability or unwillingness to identify and share all documents relevant to these issues.

With respect to process, we believe that no further consideration of the Easement Amendment should occur unless and until the documents proposed for amendment have been identified and reviewed by your office, and made available to the public. These documents include each and every easement which may be subject to the Easement Amendment, as well as all cost-share agreements and any other writings referenced in the easements or cost-share agreements. These documents should not be limited to just those easements held by Plum Creek Timber, since you acknowledged in our meeting that the Easement Amendment will be applied equally for all easements held by any private property owners who use Forest Service roads for access. It is axiomatic that a legal document cannot be amended by another writing unless the document to be amended is first identified and properly referenced in the amending instrument. Accordingly, the failure to identify, review, and properly reference the easements to be amended will make the proposed Easement Amendment legally void, and the process leading up to your expected approval fatally flawed.

The proposed Easement Amendment may also interfere with the extensive public processes involved in forest plan revisions for numerous national forests, including at least the Bitterroot, Flathead, Kootenai, and Lolo National Forests. These forest plan revisions have been proceeding

without consideration of the use of forest service roads for residential access. Accordingly, before the Easement Amendment is approved, it should be reviewed for what effect it will have on the forest plan revision procedures.

Following identification and production of all relevant documents, and review of its effect on the forest plan revision procedures, the Easement Amendment should be subject to analysis and public process pursuant to the National Environmental Policy Act (NEPA), as well as consultation and review by the U.S. Fish and Wildlife Service pursuant to the Endangered Species Act (ESA). NEPA and ESA are triggered because it is clear that entering into the Easement Amendment would be a "federal action." Although it is claimed that the proposed Amendment does nothing to change legal rights, this assertion is inconsistent with the lengthy discussions which have been necessary to negotiate the terms of the document, as well as the simple fact that your office and Plum Creek both apparently believe that an "amendment" is necessary. Furthermore, the new terms of the agreement which you have touted as beneficial to the public are all additional substantive terms that you have acknowledged did not exist in the original easements. These include new terms relating to homeowners' associations, "fire wise" requirements, and indemnification of the Forest Service. Entering into an agreement which includes new substantive terms is clearly a federal action which triggers both NEPA and ESA.

Even if you continue to deny the applicability of NEPA and ESA procedural requirements, at a bare minimum you should hold a public hearing regarding the proposed Easement Amendment in each of the counties affected by the Amendment. Given your statements that the Easement Amendment will be applied equally for all private property owners in any jurisdiction, these hearings should be held in all counties containing private property accessed via Forest Service roads, and not just those containing land owned by Plum Creek.

You have also invited us to provide suggestions regarding the language of the proposed Easement Amendment. As noted above, our ability to do so is hampered by the fact that the documents which are to be amended have not been identified and disclosed. Nonetheless, at this point we are able to identify the following issues and recommendations:

- a) The language of the Easement Amendment should be brought into conformance with the Forest Service's operating policies. In particular, the Amendment should be consistent with the standard format for all cost-share and non-cost-share road easements, and should include the language identified in the Forest Service Road Rights-of-Way Grants Handbook, FSH 2709.12, §§32.2(I) and 32.2:

"The rights herein conveyed do not include the right to use the road for access to developments used for short or long-term residential purposes, unless and until traffic control regulations, rules, and other provisions to accommodate such use of the road are agreed upon by the Grantor and Grantee."

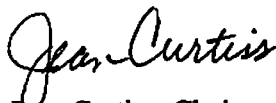
- b) We further request that language be added to the foregoing to require consultation with local government if/when "traffic control regulations, rules, and other provisions to accommodate [residential] use of the road" are negotiated between the easement holders and the Forest Service.

- c) In addition, we request that language be included in the Amendment to require that the roads be brought into compliance with local government road standards prior to any residential use, and that two (2) means of entry and exit must exist prior to any residential development. These terms are necessary for the provision of local emergency services to residences accessed by these roads, and would also assist wild lands firefighters.
- d) Pursuant to your suggestion that local zoning and regulation is the most appropriate means of addressing the impact of residential development, we suggest that the Easement Amendment should include language whereby the easement holder waives the right to protest local government zoning and/or improvement districts. We also note that we have taken your recommendations to pursue local regulations to heart, and are preparing to pursue interim zoning if the status quo is changed by amending the existing easements to add residential use.
- e) You have also noted the advantage of including language indemnifying the government from any liability relating to fires. However, the current language is limited, and we believe it would be appropriate to include state and local government in the indemnification clause.

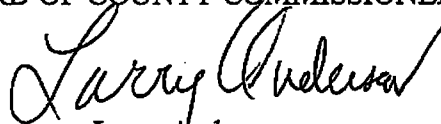
We are hopeful that you will give serious consideration to these comments, and will allow for further public input before executing what you have described as an important agreement. We look forward to your response to these comments.

Sincerely,

MISSOULA COUNTY BOARD OF COUNTY COMMISSIONERS



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cc:

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